

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**IN RE: NATIONAL PRESCRIPTION  
OPIATE LITIGATION**

This document relates to:

*All Cases.*

**MDL No. 2804**

**Case No. 17-md-2804**

**Judge Dan Aaron Polster**

**MOTION TO VACATE ORDER ON PLAINTIFFS' MOTION TO MODIFY  
PROTECTIVE ORDER AND AMENDED CASE MANAGEMENT ORDER NO. 2 AND  
SET BRIEFING SCHEDULE ON PLAINTIFFS' MOTION**

On October 14, 2021, Plaintiffs' Co-Lead Counsel, on behalf of the Plaintiffs' Executive Committee, filed a Motion to Modify Protective Order in this action. Dkt. 4024. Plaintiffs' motion asked the Court to modify Case Management Order No. 2: Protective Order to allow the parties in *In re McKinsey & Co., Inc., National Prescription Opiate Consultant Litig.*, MDL 2996, to use discovery from MDL 2804 in MDL 2996.

As Plaintiffs knew, the defendants in MDL 2996 – McKinsey & Company, Inc.; McKinsey & Company, Inc. United States; and McKinsey & Company, Inc. Washington D.C. (collectively, “McKinsey”) – opposed Plaintiffs' motion in the form it was presented to the Court. McKinsey also opposed Plaintiffs' proposed modifications to the 2804 Protective Order. Plaintiffs and McKinsey were in the process of meeting and conferring about Plaintiffs' proposed motion when Plaintiffs filed the motion.<sup>1</sup> Although Plaintiffs' motion acknowledged that Plaintiffs had

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<sup>1</sup> On October 11 at 3:43 p.m. ET, Plaintiffs emailed McKinsey: “We look forward to your redline edits to the motion we previously circulated and are hoping to file this week.” On October 13 at 4:42 p.m. ET, McKinsey emailed Plaintiffs: “Attached please find redlines to plaintiffs' draft motion and plaintiffs' proposed modified 2804 protective order.” On October 14 at 12:36 p.m. ET, Plaintiffs emailed McKinsey rejecting McKinsey's redlines and advising McKinsey that “We will file the motion to modify the use restriction in the 2804 protective order and note that we were unable to secure McKinsey's agreement.” Less than three hours later, Plaintiffs sent McKinsey a copy of the motion they had filed.

unsuccessfully “sought support from McKinsey for this request,” *id.* at 1, the motion did not fully articulate McKinsey’s position on the request, present the alternatives that had been the subject of the parties’ discussions, or inform the Court that McKinsey wished to be heard on the motion.<sup>2</sup>

Given the lack of context and the absence of a clear statement by Plaintiffs that McKinsey opposed Plaintiffs’ Motion, the Court granted the motion and entered a modified protective order immediately, without receiving a response from McKinsey. Dkt. 4028.

McKinsey respectfully submits that the Court should consider McKinsey’s position on Plaintiffs’ motion and Plaintiffs’ proposed modifications to the protective order.<sup>3</sup> If given the opportunity, McKinsey will explain and support its position, which is that any use of discovery from MDL 2804 in MDL 2996 should be on equal and fair terms; Plaintiffs, who have unfettered access to the material produced in MDL 2804, should not be able to select documents to use in MDL 2996, while McKinsey has no ability to identify, much less access, documents from MDL 2804 for use in its defense. To cure that steep information asymmetry, if Plaintiffs wish to use discovery from MDL 2804 in MDL 2996, the 2804 Protective Order should be modified in such a way as to provide both Plaintiffs and McKinsey equal access to *all* materials from MDL 2804—not just those that Plaintiffs unilaterally deem related to McKinsey—and equal rights to use such materials in MDL 2996. Until McKinsey has equal access to the materials to which Plaintiffs have access, it would be unfair to permit Plaintiffs to use in MDL 2996 any materials covered by the 2804 Protective Order.

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<sup>2</sup>Shortly after filing the motion, at 7:32 p.m. ET, a member of the Plaintiffs Executive Committee in MDL 2804 and the Plaintiffs Steering Committee in MDL 2996 emailed McKinsey: “Are you planning to file anything? Can we represent you [are] not seeking to get a response?,” to which McKinsey replied, at 8:28 p.m. ET, “McKinsey will be filing an opposition to the motion to modify the protective order.”

<sup>3</sup> McKinsey files this motion and seeks to be heard on Plaintiff’s motion in order to preserve the integrity and fairness of MDL 2996, which the MDL Panel constituted to coordinate the litigation of claims against McKinsey. By opposing this motion and proceeding in this Court, McKinsey does not waive its position that claims against McKinsey are properly coordinated and heard in MDL 2996.

To facilitate consideration of McKinsey's position, McKinsey requests that the Court vacate its order granting Plaintiffs' motion, as well as the Amended Case Management Order No. 2: Protective Order, and set a briefing schedule on the motion consistent with Local Rule 7.1.

Dated: October 15, 2021

Respectfully submitted,

/s/ Amanda K. Baker

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 15, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Amanda K. Baker

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